INDEX

PAGE

Reply to page 2: Middle of page of the Answer brief. That "Material Facts Herein" were presented to Chief Justice Vinson on April 3, 1950 2

Bottom of page 2 of Answer Brief. That respondent, attorney McNeill and his associate Gore, purchased for $18,600. claim "at petitioner's written request and for his benefit and upon his earnest solicitation and with his full knowledge of the purchase price and all the other attending circumstances" 2-3

Canon 10 of the American Bar Association, of the Bar Association of the District of Columbia, and of The Virginia State Bar 3-4

Reply to Page 3. Under "Statement" in Answer Brief 4

Bottom of Page 3. That the "Court below" found that petitioner as farmer-debtor "solicited" his attorney, McNeill, and his associate Gore, to purchase the claim of the creditor, and "requested" in writing that they buy it 4-5

Reply to Page 4 of the Answer Brief. That the purchase by an attorney of a claim against his client is not improper if;

(a) The attorney is diligent and energetic in pursuing the cause of the client;

(b) An outside purchaser would not be interested and the price is the best that can be obtained;

(c) The attorney takes a chance and reaps a profit;

(d) The transaction is in good faith and is entered into with full knowledge, consent and acquiescence and on the client's suggestion 5-6

Reply to pages 5 and 6 of Answer Brief 6-7-8-9-10

Reply to page 7 of Answer Brief. Section entitled "Reply to Petitioner's Argument" (at P. 24) 10-11

PAGE

Reply to page 8 of Answer Brief. Top of page 8 11-12-13
Bottom page 8 13-14

Reply to page 9 of Answer Brief. Paragraph in middle of page 14-15

Reply to pages 9 to 14 of Answer Brief 16-17-18

"THE LAW"

Reply to page 14 of Answer Brief "Interest" 18

CASES

A

B

Baker v. Schofield, 243 U. S. 114 16
Bruce v. Bibb, 129 Va. 45 16

C

Commonwealth Finance Corp. v. McHarg, 22 Fed. 560 7
Clark, Myra 14

D

District of Columbia v. Pace, 330 U. S. 698, 792 11

E

Erie v. Tompkins, 304 U. S. 64 16
Ex parte Whitney, 13 Pet 44 14

F

G

H

I

In re Myra Clark 14
In re Paschal (Texas v. White, 10 Wall 483 (not "19 L. Ed". but) 77 L. Ed. 992 8

J

Jackson v. Smith, 254 U. S. 587 9-10

K

L

PAGE

M

Michaud v. Girod, 4 How. 551 9
Muschany v. U. S., 324 49, 57, 58 11
Myra Clark 14

N

Niehart v. Buck, 90 F. 2d 367 7
New Orleans v. Gaines, Adm. 138 U. S. 595 14

O

P

Paschal, In re (Texas v. White), 10 Wall 483, 77 L. Ed. 992 8

Q

R

Robertson v. Chapman, 152 U. S. 693 16

S

Stiers v. Hall, 170 Va. 569 16
Stockton v. Ford, 11 How 232, 236 8

T

Texas v. White (In re Paschal), 10 Wall 483, 77 L. Ed. 992 8
Thomas v. Turner, 87 Va. 1 16

U

V

W

Welling v. General Industries, 330 U. S. 545, 550 10
Whitney, Ex parte, 13 Pet 44 14

TEXTS

Canon 10. "Canons of Professional Ethics" 3-4
1 Story "Equity Jurisprudence," Sec. 310 17

M

N

O

P

Q

R

S

T

V

W

In The

Supreme Court of the United States

October Term 1949

No. 746

FRANK CAMPBELL LITTLETON, *Petitioner,*

vs.

ROBERT H. McNEILL, ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF OF PETITIONER IN REPLY TO ANSWER BRIEF OF ROBERT H. McNEILL AND COLEMAN C. GORE, RESPONDENTS

Note. This reply brief will discuss the subjects raised in the answer brief, in the order each is first mentioned, with an appropriate heading referring to the page of the answer brief being replied to.

All emphasis in this brief is supplied, except where it is otherwise stated.

Reply to

Page 2, Middle of Page, in the Answer Brief. (That the "Material Facts Herein" Were Presented to Chief Justice Vinson on April 3, 1950.)

The statements contained in the application for recall of the mandate were made to cover the subject matter and no more; the only issues and facts set out were those deemed pertinent to that application.

The "facts and issues" involved here are stated in the petition at pages 2 and 3, at pages 4 and 8, and in the petitioner's brief, at pages 15 to 19, and at pages 19 to 21.

It should be said that distribution of the funds has not been made.

> Page 2, bottom of page, in the Answer Brief (that respondents', Attorney McNeill, and his associate Gore, purchased the $18,600.00 claim, "at petitioner's written request, and for his benefit and upon his earnest solicitation, and with his full knowledge of the purchase price and all the other attending circumstances.")

This statement is not true.

(a) The "petitioner's request" (R. 84) was not *prepared by him, but by his attorney McNeill and McNeill's associate Gore,* or *by McNeill,* or *by Gore,* and presented to the petitioner Littleton for signature. See page 26 of petitioner's brief, first two full paragraphs, on page 26, which cites and quotes the record.

(b) The purchase was for the sole benefit of Frank C. Littleton, Jr., a creditor, not for the benefit of the petitioner herein, Frank C. Littleton, Sr. The creditor was in dire straits for ready cash. Gore's testimony: Answer at top of R. 87; "desperate need" of creditor; Gore's testimony at R. 84, end of third paragraph from bottom; "to protect young Frank"; R. 89, preceding ellipses; R. 92, second question and answer from bottom.

(c) The petitioner's earnest "solicitation" was not that his attorney should purchase the son's claim, but that the note should be changed from *non-negotiable* to *negotiable,* so it could be sold for the immediate benefit of the son. R. 21 and 22, paragraph numbered 2.

The petitioner had paid and entrusted large sums to his attorney, McNeill, and presumed that, as such attorney, McNeill would not deal in the claim against him, his client. R. 22, paragraph numbered 3.

(d) The petitioner did not, *at the time of the purchase* of the note, (principal $27,200.92 plus accrued interest) and judgment ($1,844.38) know that the purchase price was $18,600.00 payable in installments, nor did he know any of the circumstances.

He repeatedly kept at his attorney, McNeill, to tell him the facts and it was not until more than a year thereafter, on March 14, 1949, which was after the real estate security was sold, that he discovered them fully. R. 22, paragraph numbered 4, to R. 27, top of page. The correspondence between the petitioner and his attorney, McNeill, which is designated as Exhibits A, B, C, D, E, F, G, H, I, and J, is set out in full at R. 27 to 40.

The date of the purchase of the claim by Attorney McNeill, and his associate Gore, was February 5, 1948, R. 16. The date of the sale of the real estate was September 2, 1948. See statement in the answer brief at page 3 in the middle of the page. The date of the hearing at which the petitioner finally learned all of the facts was March 14, 1949. R. 85, middle of page under "Abstract of Testimony."

PROFESSIONAL "CANONS OF ETHICS"

CANON 10

Adopted in 1908 by the American Bar Association; adopted by the Bar Association of the District of Columbia; 171 Virginia XXII, Canon 10 of Canons of Ethics adopted and promulgated by the Supreme Court of Appeals of Vir-

ginia, October 21, 1938. The all-inclusive reply to the entire Answer Brief is Canon 10 of the Canons of Professional Ethics of the American Bar Association, the Bar Association of the District of Columbia, and of the Virginia State Bar.

"CANON 10. THE LAWYER SHOULD NOT PURCHASE ANY INTEREST IN THE SUBJECT MATTER OF THE LITIGATION WHICH HE IS CONDUCTING."

Reply to

Page 3, Under "Statement", in the Answer Brief. Middle of Page 3 of Answer Brief: (That "Although Petitioner at First Filed Objections to the Sale, He Soon Thereafter Consented to It and Gave a Quit-Claim Deed to the Purchaser.")

There is nothing in the record to substantiate the statement just quoted above and since it is lugged in, it may be said:

1. In this unfortunate case involving "Oak Hill" in which, as respondents say in the same paragraph, the real estate alone was sold for more than enough to pay all claims, with interest, all expenses of the proceeding and "leave a surplus" (of $23,595.47 R. 76, Item q, increased by the court of appeals to $27,262.60) by reducing a $3,727.13 claim of the conciliation commissioner to $60.00). The desperation of the farmer debtor to save his historic "Oak Hill" and its associated furnishings must be imagined.

2. It is a fact—though not in the record—, as respondents assert, that the petitioner entered into an agreement with the purchaser in which on his part, among other things, he signed a quit-claim deed and the purchaser entered into certain undertakings which the petitioner asserts were not performed and therefore the whole agreement was rendered void because of failure of consideration.

Bottom of page 3 of Answer Brief (that the "Court below" found that petitioner as "farmer-debtor") "solicited" his attorney, McNeill, and his associate Gore, to purchase the claim of the creditor and "requested" in writing that they buy it.)

The statement quoted is that of the district judge at R. 67-68, quoted in the opinion of the court of appeals at R. 129. There is no evidence in the record to support these conclusions. There is plenty of evidence that the *creditor,* the holder of the note, mortgage and judgment, "solicited" and "requested" that someone buy his claims. As to the farmer-debtor, the petitioner here, he did not request his attorney to buy them as is demonstrated at pages 12 and 13 of this reply brief.

Reply to Page 4 of the Answer Brief

That the purchase by an attorney of a claim against his client is not improper if:

(a) the attorney is diligent and energetic in pursuing the cause of the client;
(b) an outside purchaser would not be interested and the price is the best that can be obtained;
(c) the attorney takes a chance and reaps a profit;
(d) the transaction is in good faith and fair and is entered into with full knowledge, consent, acquiescence and on the client's suggestion.

We will briefly reply to each of these suggestions, leaving a fuller discussion to the following heading as suggested below.

(a) When an attorney agrees to represent a client in a cause he owes his best energy and diligence to the cause of his client. His compensation is the subject of agreement between them. Whether he is paid, or to be paid, anything or nothing, is immaterial. The obligations of an attorney to his client in a cause cannot be made contingent upon the attorney's right to speculate in the subject matters involved in the cause. Speculation and representa-

tion are utterly abhorrent to each other in such a relationship.

(b) That the attorney shops around a claim against his client and pays more than outsider would pay is foreign to the relationship of trust and confidence between attorney and client.

(c) Speculation, "taking a chance and reaping a profit" is recognized as legitimate in the stock market, but not within the office of attorney for a client within the client's cause. Here the attorney and his lay associate took no chance: they did not speculate. They knew they played the game for a sure thing, the claim for which they paid 48% being considered by them worth "100 cents on the dollar". See the references to statements made by the attorney and the lay associate at pages 25 and 26 of petitioner's brief.

(d) Good faith and fairness on the part of the attorney and knowledge, consent and even the suggestion of the client, as between guardian and ward, trustee and cestui que trust, are immaterial, but if they did not exist here as shown at pages 12 and 13 of this reply brief, and in the petitioner's brief at the bottom of page 26 and the upper two-thirds of page 27.

Because these suggestions in the answer brief are buttressed by the statements which immediately follow them in that brief they are replied to further under the next heading.

Reply to Pages 5 and 6 of the Answer Brief

Under "ARGUMENTS" the answer brief says that petitioner's citations are "utterly foreign" to this case, because the agent, attorney or fiduciary was guilty of "fraud or concealment, or failure of consent without solicitation or request" in the cited cases, and that six of them are "utterly foreign". We shall see what we shall see!

1. *Niehart v. Buek*, 50 Fed. 2nd 367, cited at pages 19 and 30 of petitioner's brief. There was no fraud or concealment, or failure of consent, there was agreement. The client in his old age entered into speculations and to support them put three mortgages on real estate up to its full value. After negotiation and full consideration the client agreed to convey the title subject to all liens in full settlement of all obligations for fees, all obligations against the mortgaged real estate and to be freed from any deficiency judgments. Upon the death of the client the courts held that the right to redemption was in the heirs of the client on *two* grounds, (1) the relation of attorney and client, and (2) the advanced age and weak mind of the client. The appellate court referred to the opinion of the district judge that "the relation between the parties being one of special confidence, trust and influence, prohibited Niehart [the attorney] from taking to himself under his claimed agreed with Mills [the client] all benefit and advantage that might be obtained out of the property in litigation."

2. *Commonwealth Finance Corp. v. McHarg*, 22 Fed. 560, CCA 2, cited at pages 19 and 30 of the petitioner's brief. McHarg was not general counsel for the corporation, but was the junior member of the law firm which was its legal counsel.

It is true that the court found the attorney to have been fraudulent and for that reason denied his claim to credit for all money he paid for the property and interest on it. This despite the fact that not he personally, but his law firm was the attorney for the client. In discussing the nature of the relationship of attorney and client the court observed page 564: "the relation is one of peculiar and exceptional confidence, so much so that the courts have held that *a gift made by the client to his attorney during the continuance of the relationship cannot be upheld but must be held to be absolutely void.*" . . . "Lord Erskine said that *independent of all question of fraud*, an attorney

cannot take a gift from his client while the relation subsists *though the transaction may not only be free from fraud, but the most moral in its nature.*"

After observing that it was unnecessary to inquire whether the rule relating to such a gift would be absolutely void under all circumstances, the opinion also observed that it referred to cases so holding "to show how scrupulously the courts have protected the client against the *possibility* of imposition and any unfairness, and how *uberrima fides has been exacted.*"

3. No case cited.

4. *Texas v. White,* (in re Paschal) 10 Wall, 483, (not "19 L. ed." but) 77 L. ed. 992. It is true that the present issue was not involved in this cited case, but this court, in discussing the reason why a client may discharge its attorney, remarked that "The relations between counsel and client are of a very delicate and confidential character, and unless the utmost confidence prevails between them the client's interests must suffer."

This exemplifies the fact that the recognition of the high character of the relation of attorney and client pervades all transactions between them.

5. *Stocton v. Ford,* 11 How. 232, 236. It is quite true that this cited case involved purchase by an attorney without knowledge and consent of his client (and without knowledge and consent Attorney McNeill and his associate Gore purchased the claim against McNeill's client in the instant case). But in discussing the all-pervading high and delicate trust and relationship between attorney and client, the court made the statement quoted in petitioner's brief at page 30 of that brief.

And this court went much further in its discussion of the obligations devolving upon an attorney for his client. It said: "a court of equity, from the mere fact of such

relation would fasten upon the purchase of a trust, *without any inquiry into the motives or intentions of the attorney in making the purchase,* and compel him to give up his benefits and advantages on the reimbursement of the purchase money. *Neither fraud nor imposition need be shown.* The client may at his election treat the act as done for his benefit."

6. *Michael v. Girod,* 4 How. 551. This case involved laymen, executors, who purchased their testator's estate. This court held they could not do so because they violated their office of trust as fiduciaries. An attorney in his relation to his client, is held to at least as high a degree of responsibility as any fiduciary. In the discussion of the case immediately following in this reply brief this court in 1920 unanimously applied the reasoning of the obligation of the fiduciaries in this *Michaud* case to an attorney and his associates who bought property involved in a client's cause.

So what this court said in the *Michaud* case in 1846, is still applicable to attorney McNeill and his lay associate Gore in 1950. Here are *some* of the observations of this court in the *Michaud* case:

Page 553: "Such a transaction carries fraud on the face of it." Page 557: "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity."

Page 557: "The inquiry, in such a case, is *not whether there was or was not fraud* in fact, the purchase is void." . . . "on the ground of the temptation." . . .

7. *Jackson v. Smith,* 254 U. S. 587.

(Correction. In petitioner's brief, at page 31, where this case is cited it is said that: "An attorney and *two laymen* joined in a venture to purchase property," which is incorrect. All three were lawyers.)

The answer brief states that in this case "a receiver joined with two others, *under a secret agreement,* to purchase property." (Emphasis is in the original.) There is no suggestion in the report of the case that there was any secrecy; it was all above board; the opinion refers to them as "associated" and as "confederating." As the general rule provides, an attorney who deals in his client's affairs must render the profits to his client whose representative he is. This court so held against the participants in the *Jackson* case.

In reaching its conclusion in the *Jackson* case this court said that when the receiver, Ambrose, and his attorney, Smith, and another, Wilson, agreed to make purchase, "he placed himself in a position in which his personal interests were, or *might be,* antagonistic to those of his trust." Citing as authority, the case of *Michaud v. Girod,* 4 How. 503, 552, in which there was no attorney-client relation involved, but only that of trustee to his testator's estate.

Reply to
Page 7 of Answer Brief, (Section Entitled "Reply to Petitioner's Argument) (at p. 24)"

There is no dispute as to the facts and no finding of facts is based upon any contradictory evidence. "THE FACTS" as set out beginning at page 24 of petitioner's brief, are all taken from undisputed documents in the record, or from statements made by Attorney McNeill, Mr. Gore, or their witness. We have studied the three decisions cited by respondents, McNeill and Gore, at page 7 of their brief, which are:

Welling v. General Industries Co., 330 U. S. 545, 550, which was a Wage and Hour case, subject to special statutory rules of procedure and evidence. This court did consider the evidence and was divided, three justices dissenting as to the conclusions to be drawn from the evidence.

District of Columbia v. Pace, 330 U. S. 698, 792, was a Tax Appeal case. As the opinion recites, "The provisions for review of Board of Tax Appeal decisions present complexities almost as baffling as the test of tax ability itself." It was another case subject to special statutory provisions. This court asserted the right to disturb any findings of fact.

Muschany v. U. S., 324 U. S. 49, 57-58, held that on the specific issue of fraud the two lower courts specifically found none and the question was not argued to this court and therefore was not considered.

The petitioner in this case does not say there was fraud by Attorney McNeill and his associate Gore in buying up a claim against him, McNeill's client. He clearly states the issue to be ("First Issue" page 2 of petition) in short whether an attorney may purchase a pending secured claim against his client, and thus become his client's creditor; ("Second Issue" same page) whether the attorney may pocket the profits from the investments; and ("Third Issue" same page) whether the attorney's associate may share in such profits.

It is not necessary that an attorney must proceed fraudulently to be forbidden to deal in the subject of his client's cause. If he wishes to speculate, or deal, in property involved in court, he must refrain from representing the party who owns it.

Reply to Page 8 of the Answer Brief

Top of page 8 of the Answer Brief: "Gore, who tried ten prospects." Some impression of the inaccuracy of respondents' statements may be gained by the following: R. 97. Gore himself testified that he tried to sell the claim to *six* people. Of these six one was Attorney Ahalt, Attorney for David Rust, a creditor; One was David Rust, the creditor; the four others are strangers to the record.

Middle of Page 8 of the Answer Brief: "PETITIONER DOES NOT RAISE AN ISSUE . . . to the fact that these respondents *at petitioner's request,* purchased the claim for the *same amount,* as Petitioner was to pay." (Italics in original; caps are supplied.)

Petitioner did *not* request McNeill and Gore to purchase the claim. Their assertion is founded upon the words "to purchase the same themselves" which are imbedded between other clauses in the next to the last paragraph of the long document, appearing at R. 84 and 85, directed "To Whom It May Concern".

That assertion is made in the face of the following categorical statements in petitioner's brief which are here merely summarized for reference to that brief:

Petitioner's brief page 25, 2nd paragraph:

1. McNeill and Gore were considering purchasing the claims *at least a month* before the "To Whom it may Concern" document of February 4, 1948. R. 84, R. 97, top of page:

2. McNeill and Gore knew the month before that document was drafted that they could get the claims for $18,600.00, exactly what they paid for them. R. 95; first two questions and answers.

Petitioner's brief page 26, second and third paragraphs:

3. The "To Whom it may Concern" document of February 4, was *prepared by either McNeill and Gore or by one of them.* It was not authored or drafted by petitioner. R. 89, italized paragraphed; R. 101, last full paragraph; R. 91, bottom of page; R. 22 tenth and eleventh lines.

4. Second paragraph:

The words "purchase the same themselves" were inserted in the next to the last paragraph of the "To Whom it may Concern" document between the clauses: "To

negotiate the loan against the above securities or a sale thereof to any clients to whom they may present the matter" and "Authority to proceed to sell the same on any terms that may be satisfactory to my said son." R. 85, top of page.

Bottom of page 8 of Answer Brief:

These respondents McNeill and Gore assert here that "This Court, as shown by its refusal of certiorari to Petitioner in *Littleton v. Rust,* 334 US 833, as well as the courts below, and the parties able to purchase such a claim, knew that Petitioner was a notorious litigant, not only in this bankruptcy case but in other cases over a period of *many* years" . . . "Petitioner had eighteen different lawyers" . . .

These quotations are another gauge of the standard of assertions by these respondents.

"Notorious litigant": Let them attempt to prove their gratituous assertions by searching tables of cases for the past *fifty* years! They will find only the case they cite and only the present one.

How this Court should know by denial by certiorari in 334 US 833 that petitioner is not worthy of consideration because he is merely a "notorious litigant" is not explained. What "this Court" and practitioners before it do know from its Rules and opinions is that this Court has repeatedly explained that denial of certiorari is *never* to be understood as affirmance of the decision below, or of agreement with the court which made it.

"Eighteen lawyers": To support this assertion these respondents McNeill and Gore cite R. 127, intending perhaps to refer to R. 124 where the appellate opinion quotes the district judge as making a statement that "the *Conciliation Commissioner* has found it necessary to deal with some eighteen different lawyers". The record will not support that statement. It no doubt will be judicially noted that the Honorable Sterling Hutcheson has been a

Federal district judge for a short period and so has not had extensive contact with this case which had its inception in June, 1941. Since then lawyers have died, entered the military or other government service, or been interested in but a single angle of the case. It is doubtful whether eighteen could be named even if every member of every firm and every law clerk whoever approached the conciliation commissioner for information on the Petitioner's behalf, were all counted.

History does record that Myra Clark was in this Court as a party at least eleven times over a period of more than forty years, beginning with Ex parte Whitney, 13 Pet. (1839) 44 until she finally obtained complete vindication and her estate in *New Orleans v. Gaines,* adm. (1891) 138 US 595, was awarded costs of litigation. The epithet of "notorious litigant" was hurled at her many times in state and federal courts during her indomitable pursuit of justice.

Reply to
Page 9 of the Answer Brief
(Paragraph at middle of page)

"This statement" (meaning the statement at page 26 of Petitioner's brief "there is no evidence that Mr. Littleton, Sr. was present when the contract of February 5, 1948 (R. 16) was drawn and signed) *"is utterly contrary to all the evidence".* (Emphasis is that of the original.)

"This statement" which they say is "utterly contrary to all the evidence" is quite well supported by the evidence cited and quoted at the bottom of page 26 of Petitioner's brief and the top of page 27. Gore says the contract was drafted in *Gore's* office. McNeill says it was drafted in *McNeill's* office. Fuller says he is not sure petitioner was present; that "to my knowledge" he received a copy; "I say I *thought* he received a copy". This is not evidence that petitioner was present, or that he received a copy.

Respondents say "No part of this tsetimony was contradicted." It was positively contradicted. By letter of March 24, 1948 (Exhibit A at R. 27-28) he requested information from Attorney McNeill about the contract saying "I believe you made some kind of a deal with my son". . . . The following day, March 25, McNeill wrote petitioner saying in the last paragraph "I thought you understood all of the terms of the deal, but I will be glad to show you all the papers". . . . R. 29 last paragraph before signature, "R. H. McNeill". On March 27th petitioner wrote McNeill: "I know nothing of what was actually done in the transaction with Frank". Last paragraph of letter Exhibit C at beginning of last paragraph at R. 30. In McNeill's letter of July 20, 1948 he tells the petitioner he is "sending you here with, as requested, full information about the second mortgage." Second paragraph of Exhibit F at R. 35, at bottom of page. No such data was enclosed in that letter or received by the petitioner. R. 24 bottom of page, in Debtor's Sworn Statement which begins at R. 21.

And so on by letters dated September 8th, September 21, September 25, October 4, petitioner continued to request information that was not forthcoming. See R. 25 paragraphs (g) to (j). Letters in full at R. 36 to 40, Exhibits G to J. It was not until October 8th that McNeill wrote that he owned a "half interest in the second mortgage which amounts to a total of over $37,000.00". See Debtor's or Sworn Statement at R. 26, top of page, second quoted paragraph. Full information did not come to him until March 14, 1949 when McNeill and Gore filed their Proof of Claim with the conciliation commissioner. R. 26, last paragraph preceding paragraph 5 and paragraph 5. (This Proof of Claim is at R. 12. Although the record states "filed April 13, 1949" that is the date of filing with the clerk. The Proof of Claim shows it was dated and sworn to on March 14 and the conciliation commissioner's report was filed with the clerk of the district court April 13. R. 47.)

Reply to
Pages 9 to 14 of Answer Brief

"THE LAW"

Page 10 of the Answer Brief:

Robertson v. Chapman, 152 US 693, was not "cited by Petitioner" but by Justice Brandeis in this court's opinion in *Jackson v. Smith,* 254 US 587, in support of that portion of the opinion saying that lawyer "Ambrose had, as receiver, the affirmative duty to endeavor to realize the largest possible amount from the Schwab note. *Baker v. Schofield,* 243 U. S. 114; *Robertson v. Chapman,* 152 U. S. 673, 681." It would be odd indeed if a case cited in its opinion by this Court should overrule the decision made in that opinion! *Jackson v. Smith,* 254 U. S. 587, still stands.

Page 11 of Answer Brief:

Stiers v. Hall, 170 Va. 569. It is sufficient to say that the contract between lawyer and client was set aside in that case. The Court said the *burden was on the lawyer* to show (1) the transaction was perfectly fair, (2) entered into by the client freely and (3) that it was entered into with full understanding of the nature and extent of his rights to enable the client to thoroughly comprehend the effect of the transaction. The Court held that the lawyer could not recover on the contract but should be paid per quantum meruit.

The Virginia court was applying the Virginia law, which of course under *Erie v. Tompkins,* 304 U. S. 64, is applicable here in this Virginia case arising in a federal court sitting in Virginia. A finding of fraud is not necessary. *Bruce v. Bibb,* 129 Va. 45, where the attorney was a lawyer of highest repute and the client and his successors continued to accept services under a contract, never objected to it though it was shown to him and he read it. *Thomas v. Turner,* 87 Va. 1, holding that the presumption of invalidity may only be overcome by the clear-

est and most satisfactory evidence. Virginia courts quote with approval Justice Story's analysis of the reason for strict watch over transactions over lawyer and client in which the lawyer goes outside his advocacy for his client and becomes interested in profiting out of the client's predicament. In 1 Story "Equity Jurisprudence", at Section 310, Justice Story said that the law "often interposes to declare transactions void which between other persons would be held unobjectionable".

Attorney McNeill never explained to his client the full implications of the purchase by him of a claim against his client and the policy of the law seriously to disapprove of it. On the contrary it was a long time before he explained to his client what he had done.

We think it has been made perfectly clear that Attorney McNeill and his associates knew they would be paid the full amount of the note and the judgment long before they bought them and that they knew they could buy them for half price from the improvident creditor long before they bought them.

In view of the mention of "$6,000.00" and "$5200.00" at the top of page 13 of the Answer Brief we do wish to make it perfectly clear that McNeill and Gore paid $18,600.00 and not a cent more for the claims which were ordered paid in the total sum of $38,440.27. R. 75, item (F). That they paid a total of only $18,600.00, see R. 98, Cross Examination of Gore: "Q And a consideration of $18,600.00 was paid for both the note and the judgment? A Yes, and accumulated interest.

We would notice also the implication that the courts should now overrule all of the strictures of American and English courts and of the most learned law writers through past generations against the mixing of a lawyer's duty to his client in a cause with that of an investor, seeking profits, in the affairs of his unfortunate client who has retained him to use his skill as an advocate to rescue the